

NOTES AND COMMENTS

THE RES JUDICATA AND COLLATERAL ESTOPPEL EFFECT OF PRIOR STATE SUITS ON ACTIONS UNDER SEC RULE 10b-5*

THE Securities Exchange Act of 1934,¹ a part of a comprehensive national scheme governing public investment in securities,² allows private parties to maintain actions for damages caused by trading activities which it proscribes or which are forbidden by Securities and Exchange Commission rules which implement the act's provisions.³ Although jurisdiction over such suits is vested exclusively in the federal courts,⁴ conduct giving rise to civil liability under the federal act is often also actionable under a substantial body of state law dealing with the sale of securities.⁵ Rights thereunder were expressly pre-

*Connelly v. Balkwill, 174 F. Supp. 49 (N.D. Ohio 1959).

1. 48 Stat. 881, as amended, 15 U.S.C. § 78 (1958).

2. The complex of laws of which the Act is a part includes the Securities Act of 1933, 48 Stat. 74, as amended, 15 U.S.C. §§ 77a-mm (1958); Public Utility Holding Company Act of 1935, 49 Stat. 838, 15 U.S.C. § 79 (1958); Trust Indenture Act of 1939, 53 Stat. 1149, 15 U.S.C. §§ 77aaa-aaaa (1958); Investment Company Act of 1940, 54 Stat. 789, 15 U.S.C. § 80a (1958); and Investment Advisers Act of 1940, 54 Stat. 847, 15 U.S.C. § 80b (1958). Chapter X of the Bankruptcy Act, 52 Stat. 894 (1938), 11 U.S.C. § 608 (1958), gives the Securities and Exchange Commission, created by the Securities Exchange Act § 4, 48 Stat. 885 (1934), 15 U.S.C. § 78d (1958), advisory functions in corporate reorganizations.

3. The act contains only four provisions which specifically relate to civil actions: § 9(e), 48 Stat. 889, 15 U.S.C. § 78i(e) (1958) (market manipulation and stabilization); § 16(b), 48 Stat. 896, 15 U.S.C. § 78p(b) (1958) (insider trading); § 18, 48 Stat. 897, 15 U.S.C. § 78r (1958) (false registration statements); § 29(b), 48 Stat. 903, 15 U.S.C. § 78cc(b) (1958) (contracts in violation of the act). Courts, however, have implied civil liability from the language and purpose of other sections of the act under the doctrine of tort liability for conduct in contravention of statute. See *Fischman v. Raytheon Mfg. Co.*, 188 F.2d 783 (2d Cir. 1951); *Osborne v. Mallory*, 86 F. Supp. 869 (S.D.N.Y. 1949); *Speed v. Transamerica Corp.*, 71 F. Supp. 457 (D. Del. 1947); *Kardon v. National Gypsum Co.*, 69 F. Supp. 512 (E.D. Pa. 1946), *second opinion*, 73 F. Supp. 798 (E.D. Pa. 1947); *Loss, SECURITIES REGULATION* 1043-52 (1951); *Note*, 61 HARV. L. REV. 858 (1948); *Note*, 42 VA. L. REV. 537 (1956); *Note*, 59 YALE L.J. 1120 (1950).

4. Securities Exchange Act of 1934, § 27, 48 Stat. 902, 15 U.S.C. § 78aa (1958). The other acts relating to public investment, see note 2 *supra*, grant civil jurisdiction concurrently to state and federal courts. Securities Act of 1933, § 22(a), 48 Stat. 86, 15 U.S.C. § 77v(a) (1958); Public Utility Holding Company Act of 1935, § 25, 49 Stat. 835, 15 U.S.C. § 79y (1958); Trust Indenture Act of 1939, 53 Stat. 1175, 15 U.S.C. § 77vvv(b) (1958); Investment Company Act of 1940, § 44, 54 Stat. 844, 15 U.S.C. § 80a-43 (1958); Investment Advisers Act of 1940, § 214, 54 Stat. 856, 15 U.S.C. § 80b-14 (1958). The 1934 departure from this procedure is not explained in the legislative history. See H.R. REP. No. 1383, 73d Cong., 2d Sess. (1934); S. REP. No. 792, 73d Cong., 2d Sess. (1934).

5. See *Errion v. Connell*, 236 F.2d 447 (9th Cir. 1956); *Loss, SECURITIES REGULATION* 955 (1951). Common-law counts of fraud or deceit will often lie concurrently with

served by Congress.⁶ Since state courts may refuse to adjudicate the federal claim,⁷ and since state adjudications of such claims, when made, probably do not prevent federal reconsideration,⁸ a plaintiff unsuccessful in a state suit may attempt to maintain a subsequent federal action based on the same facts.

Such an attempt was made in *Connelly v. Balkwill*.⁹ Plaintiffs, former majority stockholders of the Cleveland Frog and Crossing Company, a closely held Ohio corporation, had previously sued defendant, a director of the company, in the Ohio state courts, for damages purportedly incurred in the sale of plaintiffs' stock to a competitor.¹⁰ As a result of the sale, and prearranged transactions between defendant and the purchaser, defendant had become the corporation's sole shareholder and president. The corporation had then sold or leased all its assets to the competitor. The state-court action was founded on allegations of common law misrepresentation and breach of a fiduciary duty; plaintiffs claimed that defendant's concealment of his arrangement with, and the identity of, the competitor-purchaser resulted in a profit to him considerably in excess of that which they received. The Ohio courts had found, however, that plaintiffs' own insistence on cash payment at a set price had rendered defendant's negotiations with the competitor immaterial, and recovery had been denied. Plaintiffs then brought the instant action in federal district court.¹¹ They claimed that defendant's conduct constituted a breach of an affirmative duty to disclose, and thus fell within the prohibition of fraud

counts under the securities acts. See, e.g., *Fry v. Schumaker*, 83 F. Supp. 476 (E.D. Pa. 1947); cf. *Metzger v. Breeze Corps.*, 37 F. Supp. 693 (D.N.J. 1941) (third party complaint not limited to causes of action created by Securities Act of 1933, hence not barred by act's statute of limitations); *M. J. Hall & Co. v. Johnson*, 92 N.Y.S.2d 202 (Sup. Ct. 1940) (counts under Securities Act of 1933 dismissed because period of limitations had run; common-law counts upheld). And forty-eight states currently have statutes regulating securities, commonly called Blue Sky Laws. Delaware's one-paragraph statute was omitted from the 1953 revision of the state code, while Nevada has never had such an act. Cowett, *Federal-State Relationships in Securities Regulation*, 28 GEO. WASH. L. REV. 287, 290 & n.15 (1959).

6. Securities Exchange Act of 1934, § 28, 48 Stat. 903, 15 U.S.C. § 78bb (1958); see text at notes 39-41 *infra*.

7. *Standard Power & Light Corp. v. Investment Associates, Inc.*, 51 A.2d 572 (Del. 1947) (lack of jurisdiction to consider Securities Exchange Act or SEC rules asserted in proxy fight); *American Distilling Co. v. Brown*, 295 N.Y. 36, 64 N.E.2d 347 (1945) (no jurisdiction to hear shareholder's suit under § 16(b) of the act).

8. See notes 23, 24 *infra* and accompanying text.

9. 174 F. Supp. 49 (N.D. Ohio 1959).

10. Plaintiffs first brought suit in the Court of Common Pleas for Lake County, *Connelly v. Balkwill*, No. 24234, Ohio C.P., Lake County, June 25, 1952. The Court of Appeals affirmed on a trial de novo, No. 519, Ohio Ct. App., 7th Dist., Sept. 15, 1954. A motion to certify to the Supreme Court of Ohio was overruled, No. 34264, Ohio, Jan. 26, 1955.

11. In this action they joined the competitor and an agent of the competitor in the sale as additional defendants. A valid claim could be made against these defendants under the federal act for their part in the alleged fraud. *Kardon v. National Gypsum Co.*, 69 F. Supp. 512 (E.D. Pa. 1946); note 15 *infra*; see note 42 *infra*.

in the purchase or sale of securities enunciated by section 10(b) of the Securities Exchange Act and SEC rule 10b-5.¹²

The district court found, on defendant's motion for summary judgment, that plaintiffs' failure in state court prevented subsequent recovery in a federal forum under 10b-5. First, the court noted that the facts complained of in both actions were identical.¹³ It then examined Ohio law, and found that Ohio's common-law requirements of disclosure were as stringent as those of 10b-5.¹⁴ This comparison led the court to hold that the state and federal causes

12. Section 10, 48 Stat. 891 (1934), 15 U.S.C. § 78j(b) (1958), reads
It shall be unlawful for any person, . . .

....

(b) To use or employ, in connection with the purchase or sale of any security . . . , any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Rule 10b-5, 17 C.F.R. § 240.10b-5 (1949), supplements this as follows:

Employment of manipulative and deceptive devices by any purchaser of a security. It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud.

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

By basing their claim upon *Balkwill's failure to disclose*, plaintiffs were attempting to distinguish this action from the earlier Ohio suit, in which they had alleged *concealment*. Plaintiffs' Brief and Affidavit Opposing Defendants' Motion for Summary Judgment, p. 26. They hoped to bring themselves within the purview of *Kardon v. National Gypsum Co.*, 73 F. Supp. 798 (E.D. Pa. 1947), which indicates that recovery under 10b-5 does not require proof of the elements of common-law fraud. See Plaintiffs-Appellants Brief and Appendix Before the United States Court of Appeals for the Sixth Circuit, pp. 18-20. Whether such reliance was justified is open to question. While commentators, see, e.g., Note, 59 YALE L.J. 1120, 1122 (1950), have used this case to support generalizations about the wide scope of 10b-5, some later holdings have been more restrained, see *Joseph v. Farnsworth Radio & Television Corp.*, 99 F. Supp. 701 (S.D.N.Y. 1951), *aff'd per curiam*, 198 F.2d 883 (2d Cir. 1952); *Birnbaum v. Newport Steel Corp.*, 193 F.2d 461 (2d Cir.), *cert. denied*, 343 U.S. 956 (1952); Latty, *The Aggrieved Buyer or Seller or Holder of Shares in a Close Corporation Under the S.E.C. Statutes*, 18 LAW & CONTEMP. PROB. 505, 514, 521 (1953); Note, 42 VA. L. REV. 537 (1956).

13. 174 F. Supp. at 51-55.

14. *Id.* at 56-60.

It is arguable whether Ohio law is in fact as stringent as the law under 10b-5, which itself is unclear, see note 12 *supra*. Cases cited by the *Balkwill* court impose liability for nondisclosure upon fiduciaries, including directors of corporations dealing with stockholders. See, e.g., *Beck v. Fishel*, 16 Ohio C.C.R. (n.s.) 130 (1909). But whether Ohio would impose liability on directors dealing with other directors of a close corporation, as was done under 10b-5 in *Kardon v. National Gypsum Co.*, 73 F. Supp. 798 (E.D. Pa.

of action were the same, and to apply res judicata to bar a second suit.¹⁵ Were res judicata inapplicable, the court further ruled, collateral estoppel would defeat plaintiffs' claim.¹⁶ The court regarded the state determinations that defendant's negotiations with the competitor were immaterial and that no fraud was involved in the transaction¹⁷ as facts which could not be relitigated under that doctrine.¹⁸

This application of collateral estoppel seems questionable. Under *The Evergreens v. Nunan*,¹⁹ prior findings are given estoppel effect only as to those points in issue which are "ultimate" rather than "mediate" in the second action.²⁰ An "ultimate fact" is a point in issue which would constitute a final

1947), is doubtful. As between codirectors, the old Ohio rule of "equal acquaintance" with the subject might remove the fiduciary obligation to disclose. See *Steele v. Worthington*, 2 Ohio 182, 195 (1825). Thus, codirectors might have to fall back on the common-law standards of fraud in the absence of fiduciary duty. To warrant the imposition of liability, nondisclosure must be of facts which the defendant is under an obligation to disclose. *Conrad v. Sarver*, 97 Ohio App. 199 (1954). And while it is clear that nondisclosure of a breeding cow's barrenness is fraud, *Hadley v. Clinton County Importing Co.*, 13 Ohio St. 502 (1862), it is by no means certain that pending sales of assets to competitors will be so regarded, see *Gray v. Hafer*, 2 Ohio N.P. (n.s.) 341 (Super. Ct. 1904). Moreover, plaintiffs seeking to recover from defendants not regarded as fiduciaries must prove false representation or concealment of a material fact, made knowingly and with intent to deceive the person deceived, on which the victim relies to his detriment. See *Lucke v. Robison & Co.*, 56 Ohio App. 242, 10 N.E.2d 283 (1937); *Davish v. Arn*, 32 Ohio L. Abs. 646 (Ct. App. 1940).

15. 174 F. Supp. at 60.

16. *Id.* at 63.

17. See *id.* at 54.

18. *Id.* at 62. Additionally, the court held the action barred by the statute of limitations. In the absence of an express congressional limitation, the court applied Ohio's four-year statute for actions based on fraud. *Id.* at 63-64. This comports with general federal practice; federal courts have consistently applied to actions under 10b-5 the limitations of the state in which the alleged wrong occurred. See, e.g., *Fratt v. Robinson*, 203 F.2d 627 (9th Cir. 1953); *Fischman v. Raytheon Mfg. Co.*, 188 F.2d 783 (2d Cir. 1951); *Northern Trust Co. v. Essaness Theatres Corp.*, 103 F. Supp. 954 (N.D. Ill. 1952).

One plaintiff in a 10b-5 suit has attempted to bring himself within *Holmberg v. Armbrecht*, 327 U.S. 392 (1945), which held that in the enforcement of federally created equitable rights, federal courts are to look to the federal doctrine of laches rather than limitations, by alleging that his suit, for an accounting based on fraud, was wholly equitable in nature. This argument was rejected, the court regarding the suit as "mixed," within the concurrent jurisdiction of law and equity, and subject to both limitations and laches. *Tobacco & Allied Stocks, Inc. v. Transamerica Corp.*, 143 F. Supp. 323 (D. Del. 1956), *aff'd*, 244 F.2d 902 (3d Cir. 1957), 70 HARV. L. REV. 566 (1957). When federally created rights are not wholly equitable, the state limitation will apply. *Cope v. Anderson*, 331 U.S. 461 (1947). See generally Note, *Federal Statutes Without Limitations Provisions*, 53 COLUM. L. REV. 68 (1953); 2 MOORE, FEDERAL PRACTICE ¶ 3.07 (2d ed. 1948).

19. 141 F.2d 927 (2d Cir.), *cert. denied*, 323 U.S. 720 (1944).

20. The *Restatement of Judgments* was altered in 1948 to conform to Judge Learned Hand's *Evergreens* formulation. RESTATEMENT, JUDGMENTS § 68, comment p (Supp. 1948). The rule of *Evergreens* is regarded as "normal" by the Supreme Court. See *Yates v. United States*, 354 U.S. 298, 338 (1957).

adjudication of a legal right; a "mediate fact," on the other hand, is a point which itself does not raise the right or duty in question, but which can only serve as a basis for the ultimate conclusion.²¹ The ultimate fact in the instant federal action was whether defendant's admitted failure to disclose violated 10b-5.²² Since the state courts decided at most that under Ohio law he had no duty to disclose,²³ their judgments would not, under *Evergreens*, collaterally estop subsequent litigation of the 10b-5 claim, which they never reached. Moreover, had the Ohio courts adjudicated the federal question of plaintiffs' rights under 10b-5, their decisions would not, under the apparent weight of authority, bar subsequent redetermination in a federal suit. While state courts may decide questions within the federal courts' exclusive jurisdiction when they are necessary to the decision of a state action,²⁴ federal courts will prevent infringement of their exclusive jurisdiction by refusing to accord to such state findings the effect of collateral estoppel.²⁵

Furthermore, the court's view of res judicata seems erroneous in theory and unsusceptible of satisfactory application in other cases. It is, of course, horn-book law that res judicata will bar a second action only if it is based on the same "cause of action" as the first.²⁶ But "cause of action," for res judicata, as for other, purposes, is a phrase which demands specific content. The *Balkwill* court assumed that two suits are based on one cause of action only if the law to be applied in both is the same. In other contexts, however, this narrow formulation has been rejected, and "cause of action" has been defined not by reference to the law applicable in each suit, but to the legal right which furnishes the basis for each claim. For example, an injured seaman, whether suing under the Jones Act²⁷ or for unseaworthiness under the general mari-

21. *The Evergreens v. Nunan*, 141 F.2d 927, 928 (2d Cir.), *cert. denied*, 323 U.S. 720 (1944); Note, 69 YALE L.J. 462, 468 (1960).

22. See *Speed v. Transamerica Corp.*, 71 F. Supp. 457, 458 (D. Del. 1947) (common-law count dismissed, but 10b-5 claim retained since "plaintiffs have alleged the ultimate fact of violation of the statute").

23. The Ohio Court of Appeals filed as its conclusions of law that *Balkwill* was not liable as a director, on the corporate transaction theory, as an agent, or for fraud; and that no "special circumstances" in the case warranted the imposition of liability. *Connelly v. Balkwill*, No. 519, Ohio Ct. App., 7th Dist., Sept. 15, 1954.

24. *MacGregor v. Westinghouse Co.*, 329 U.S. 402 (1947); *Pratt v. Paris Gas Light & Coke Co.*, 168 U.S. 255 (1897).

25. *Lyons v. Westinghouse Elec. Corp.*, 222 F.2d 184 (2d Cir.), *cert. denied*, 350 U.S. 825 (1955), 69 HARV. L. REV. 573 (1956); RESTATEMENT, JUDGMENTS § 71, comment c (1942); see *Becher v. Contoure Labs., Inc.*, 279 U.S. 388, 391 (1929) ("establishing a fact and giving specific effect to it by judgment are quite distinct"). But see *Vanderveer v. Erie Malleable Iron Co.*, 238 F.2d 510, 515 (3d Cir. 1956), *cert. denied*, 353 U.S. 937 (1957) (questioning applicability of § 71 to federal-state relationship); Comment, 8 STAN. L. REV. 439 (1956) (criticizing rationale of exclusive federal jurisdiction).

26. *Cromwell v. County of Sac*, 94 U.S. 351 (1876); *Miller v. National City Bank*, 166 F.2d 723 (2d Cir. 1948); *Smith v. Lykes Bros.-Ripley S.S. Co.*, 105 F.2d 604 (5th Cir. 1939); RESTATEMENT, JUDGMENTS § 62 (1942).

27. 41 Stat. 1007 (1920), 46 U.S.C. § 688 (1958).

time law, has "a single primary right . . . , namely, the right of bodily safety";²⁸ and the "single wrongful invasion" of this right by the defendant gives rise to only one cause of action.²⁹ Similarly, plaintiffs in *Balkwill* sought in both actions damages for invasion of a right to be dealt with fairly and without fraud. And the same conduct by defendant—his failure to reveal his negotiations with the competitor-purchaser—was alleged to have abridged this right in both suits.³⁰ The "cause of action," therefore, would be the same regardless of any difference in law.³¹ Additionally, under the *Balkwill* "comparison" approach, res judicata would not apply in many similar cases, notwithstanding that only one wrong had invaded one right. The court ruled that Ohio common law was as stringent in its standards of disclosure as 10b-5,³² but in other states common-law disclosure standards are considerably less rigorous.³³ Following *Balkwill*, a plaintiff who had unsuccessfully sought common-law recovery in such a state could maintain a later federal action merely by demonstrating the difference in standards.

28. *Baltimore S.S. Co. v. Phillips*, 274 U.S. 316, 321 (1927).

29. *Ibid.*; accord, *Troupe v. Chicago D. & G. Bay Transit Co.*, 234 F.2d 253 (2d Cir. 1956). This rule holds in spite of the fact that recovery for unseaworthiness may be based only on the vessel's condition, while negligent operation is grounds for relief under the statute. *Ibid.*; *Baltimore S.S. Co. v. Phillips*, *supra* note 28; see *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430 (1943) (single injury in course of employment can create only one cause of action although workmen's compensation act of one state affords greater recovery than damages awarded in previous action); *Williamson v. Columbia Gas & Elec. Corp.*, 186 F.2d 464, 470 (3d Cir. 1950) ("the acts complained of and the demand for recovery are the same. The only thing that is different is the theory of recovery [violation of Sherman Act §§ 1, 2 in one action; of Clayton Act § 7 in the other]."); *F. L. Mendez & Co. v. General Motors Corp.*, 161 F.2d 695, 697 (7th Cir. 1947) (primary right allegedly injured was contract right to automobile franchise, defendant's alleged wrong was cancellation; therefore only one cause of action, although different theories of recovery under Sherman and Clayton Acts put forth in different actions); *United States v. California & Ore. Land Co.*, 192 U.S. 355, 358 (1904) (United States sought to establish its ownership of certain land; first action alleged patents it issued had been forfeited, second action alleged particular parcel had been excepted from the original grant as an Indian reservation; "the parties, the subject matter and the relief sought all were the same. . . . The best that can be said . . . is that now the United States puts forward a new ground for its prayer."); *Schopflocher, What Is a Single Cause of Action for the Purpose of the Doctrine of Res Judicata?*, 21 ORE. L. REV. 319, 332 (1942).

30. See 174 F. Supp. at 55, 59. Compare Plaintiffs' Brief, *Connelly v. Balkwill*, No. 519, Ohio Ct. App., 7th Dist., Sept. 15, 1954, with Plaintiffs' Brief, *Connelly v. Balkwill*, 174 F. Supp. 49 (N.D. Ohio 1959).

31. See *Kaufman v. Shoenberg*, 154 F. Supp. 64 (D. Del. 1954).

32. 174 F. Supp. at 60; see note 14 *supra* and accompanying text.

33. See *Hawkins v. Merrill, Lynch, Pierce, Fenner & Beane*, 85 F. Supp. 104 (W.D. Ark. 1949) (defendants liable under 10b-5; Arkansas common law would not have allowed recovery). Compare *Geller v. Transamerica Corp.*, 53 F. Supp. 625 (D. Del. 1943), *aff'd per curiam*, 151 F.2d 534 (3d Cir. 1945) (recovery denied under Kentucky and Delaware law), and *Speed v. Transamerica Corp.*, 71 F. Supp. 457 (D. Del. 1947) (same), with *Speed v. Transamerica Corp.*, 99 F. Supp. 808 (D. Del. 1951) (recovery granted under 10b-5). Professor Loss regards the states which compel disclosure comparably with 10b-5 as a minority. Loss, *SECURITIES REGULATION* 825 (1951).

Balkwill's "comparison" theory of res judicata may represent a search for a formula which would allow plaintiffs to try all possible theories of recovery. The court may have felt that barring the federal claim when state disclosure requirements are less stringent than 10b-5 would be unfair to plaintiffs who can not ordinarily base recovery in the courts of such a state on the more favorable standard.³⁴ But refurbishing the concept of "cause of action" to accommodate plaintiffs seemingly overlooks the fact that reasonably diligent plaintiffs can sue in federal court and there employ both state and federal theories in one action.³⁵ Plaintiffs here voluntarily brought their action in a court which could hear only one theory of recovery. Applying res judicata in a second suit, irrespective of the limited jurisdiction of the first court,³⁶ will protect defendants from the expense and uncertainty of relitigation and will minimize the possibility of nuisance suits, always present in corporate-shareholder litigation.³⁷ Admittedly, the plaintiff who inadvertently pursues his claims to judgment in state court will be deprived of a federal hearing, but his plight seems no more deserving of relief through doctrinal alteration of res judicata than does that of the plaintiff who negligently fails to raise all theories of recovery open to him in an earlier action.³⁸

Arguably, however, section 28(a) of the act prevents the application of res judicata. The section provides:

34. See note 7 *supra*.

35. See *Hurn v. Oursler*, 289 U.S. 238 (1933); *Siler v. Louisville & N.R.R.*, 213 U.S. 175 (1909); *UMW v. Meadow Creek Coal Co.*, 263 F.2d 52 (6th Cir. 1959); 2 MOORE, FEDERAL PRACTICE ¶ 2.06[6] (2d ed. 1948).

36. See *Baltimore S.S. Co. v. Phillips*, 274 U.S. 316 (1927); RESTATEMENT, JUDGMENTS § 62, comment j (1942) ("The plaintiff, having voluntarily brought his action in a court which can give him only a limited remedy, cannot insist on obtaining a further remedy in another action."); Scott, *Collateral Estoppel by Judgment*, 56 HARV. L. REV. 1, 22-24 (1942); *Developments in the Law—Res Judicata*, 65 HARV. L. REV. 818, 827 (1952).

37. Cf. *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 548 (1949) (derivative action). The number of derivative suits felt to be of this character has resulted in legislation designed to hamper them. See, e.g., N.Y. GEN. CORP. LAW § 61(b); N.J. STAT. ANN. § 14:3-15 (Supp. 1959). For criticism of these impediments to shareholder's suits, see Hornstein, *New Aspects of Stockholders' Derivative Suits*, 47 COLUM. L. REV. 1, 3 (1947).

38. See *Davis v. McKinnon & Mooney*, 266 F.2d 870 (6th Cir. 1959); *Miller v. National City Bank*, 166 F.2d 723 (2d Cir. 1948).

The doctrine of res judicata precludes the parties from showing what is or may be the truth. Why should not the truth prevail? The answer is based upon public policy. The interests of the state and of the parties require the putting of an end to controversies. One way of ending controversies is to preclude the bringing of an action after a period of time has elapsed, and thus a perfectly valid claim may be barred by a statute of limitations or by laches. The policy against relitigation is even stronger.

Scott, *Collateral Estoppel by Judgment*, 56 HARV. L. REV. 1 (1942). But see Cleary, *Res Judicata Reexamined*, 57 YALE L.J. 339 (1948).

The rights and remedies provided by this title shall be in addition to any and all other rights and remedies that may exist at law or in equity; but no person permitted to maintain a suit for damages under . . . this title shall recover, through satisfaction of judgment in one or more actions, a total amount in excess of his actual damages on account of the act complained of.³⁹

The reference to "one or more actions" can be read as contemplating two actions arising out of the same prohibited transaction; thus res judicata would have no place in a *Balkwill*-type situation.⁴⁰ But legislative history indicates only that this section was intended to prevent federal preemption of the entire field of securities regulation and not to overrule generally applicable res judicata principles in Securities Exchange Act cases.⁴¹ Indeed, since res judicata applies only when the parties to both actions are identical,⁴² and since an aggrieved party may be able to bring different actions based on the same facts against different parties, for example, one based on a state Blue Sky Law and another for violation of federal statute,⁴³ the multiplicity of actions envisaged

39. Securities Exchange Act of 1934, § 28(a), 48 Stat. 903, 15 U.S.C. § 78bb(a) (1958). Analogous saving clauses appear in the Securities Act of 1933, § 18, 48 Stat. 85, 15 U.S.C. § 77r (1958); Public Utility Holding Company Act of 1935, § 21, 49 Stat. 834, 15 U.S.C. § 79u (1958); Trust Indenture Act of 1939, 53 Stat. 1177, 15 U.S.C. § 77zzz (1958); Investment Company Act of 1940, § 50, 54 Stat. 846, 15 U.S.C. § 80a-49 (1958).

40. Res judicata, as judicial policy, will yield to express legislative provisions. See, e.g., *Lyons v. Westinghouse Elec. Corp.*, 222 F.2d 184, 189 (2d Cir.), *cert. denied*, 350 U.S. 825 (1955); N.Y. MUNIC. CT. CODE § 186, *Auster v. Princess Fabrics*, 174 Misc. 1096, 22 N.Y.S.2d 686 (Sup. Ct. 1940) (small claims court); N.Y.C. DOM. REL. CT. ACT § 137.1, *Benedict v. Benedict*, 203 Misc. 286, 115 N.Y.S.2d 352 (Dom. Rel. Ct. 1952).

41. See H.R. REP. No. 1383, 73d Cong., 2d Sess. (1934); S. REP. No. 792, 73d Cong., 2d Sess. (1934); LOSS, *SECURITIES REGULATION* 955 (1951); Cowett, *Federal-State Relationships in Securities Regulations*, 28 GEO. WASH. L. REV. 287, 289 (1959).

42. See, e.g., *Iselin v. C. W. Hunter Co.*, 173 F.2d 388 (5th Cir. 1949); RESTATEMENT, JUDGMENTS §§ 93, 94 (1942).

The additional defendants joined in the federal *Balkwill* litigation, see note 11 *supra*, should not have been extended the protection of res judicata. A judgment for or against one of two joint tortfeasors will not bar a suit against the other where no duty of indemnity exists. *Bigelow v. Old Dominion Copper Co.*, 225 U.S. 111 (1907); *Bomar v. Keyes*, 162 F.2d 136 (2d Cir. 1947); RESTATEMENT, JUDGMENTS § 94 (1942). *But cf.* *Mooney v. Central Motor Lines, Inc.*, 222 F.2d 572 (6th Cir. 1955). Allowing such successive suits against one or another of several joint tortfeasors does not nullify the efficacy of res judicata. See notes 36-38 *supra* and accompanying text. Parties who seem likely to be sued in a subsequent action can join in the defense of their alleged joint tortfeasor. The additional defendants in *Balkwill* could have joined with him in the defense of the Ohio action. If they did, and gave notice to plaintiffs, they would be entitled, as parties "in privity" with *Balkwill*, to the bar of res judicata in a subsequent suit. *Minneapolis-Honeywell Regulator Co. v. Thermoro, Inc.*, 116 F.2d 845 (2d Cir. 1941); see *Southern Pac. R.R. v. United States*, 168 U.S. 1, 48-49 (1897); RESTATEMENT, JUDGMENTS §§ 83, 84 (1942). The extent of any alleged participation in the prior action thus should have been considered by the *Balkwill* court.

43. For example, many of the Blue Sky Laws extend liability to persons not covered by the Securities Exchange Act or the Securities Act. Illinois holds "the issuer, control-

by section 28(a) is wholly consistent with *res judicata*.⁴⁴ It might still be argued that employing *res judicata* to bar a federal suit subsequent to a state action between the same parties forces an election of remedies and thus negates that part of this section which preserves "any . . . rights and remedies that may exist at law or in equity." But requiring plaintiffs to try all theories of recovery at once—in a federal suit—would not deprive them of any right, state or federal, under the common law or under statute.

ling person, underwriter, dealer or other person by or on behalf of whom said sale was made, and each underwriter, dealer or salesman who shall have participated or aided in any way in making such sale . . . [and] each of its officers and directors . . . who shall have participated or aided in making such sale." ILL. REV. STAT. ch. 121½, § 137.13 (1957). Several others extend liability to "every person" participating in or aiding the sale. See, *e.g.*, Arizona Securities Act, ARIZ. REV. STAT. ANN. § 44-2003 (1956); OHIO REV. CODE ANN. § 1707.43 (Page 1954); Washington Securities Act, WASH. REV. CODE ANN. § 21.04.210 (1957); Wisconsin Securities Law, WIS. STAT. ANN. § 189.18(1) (1957). Others contain various provisions for liability of particular persons. See, *e.g.*, MICH. STAT. ANN. § 19.760 (1959) (salesmen and agents); Florida Uniform Sale of Securities Law, FLA. STAT. ANN. § 517.21(1) (1943) (directors and officers of seller).

Of this group, the statutes of only two states require that the person sought to be held liable have actual knowledge of the violation—which may have been committed, for example, by an issuer, independent of the seller, broker or agent. See Iowa Securities Law, IOWA CODE ANN. § 502.23 (1949); Oregon Securities Law, ORE. REV. STAT. § 59.250 (1959). In this respect the Blue Sky Laws differ significantly from 10b-5, which refers only to the person perpetrating the alleged fraud. See *Hawkins v. Merrill, Lynch, Pierce, Fenner & Beane*, 85 F. Supp. 104 (W.D. Ark. 1949). Thus a plaintiff who had bought securities of an insolvent corporation might have a federal claim against the directors and the corporation for misstatements as to the corporation's financial status, and a second claim based on state law against a local dealer or agent who actually sold the securities to plaintiff.

44. See RESTATEMENT, JUDGMENTS §§ 84, comment b, 93 (1942).